SUBJECT INDEX

	Page
OPINIONS BELOW.	2
JURISDICTION.	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	10
CONCLUSION.	20
APPENDIX	21

TABLE OF AUTHORITIES CITED

Page

CASES

Bensing v. Bensing,
(May 23, 1972, 1 Civil No. 28959). 10

Free v. Bland,
369 U. S. 633 (8 L.Ed.2d 180,
82 S.Ct. 398). 15

French v. French,
17 Cal.2d 775, 778 10

Hooper v. United States,
164 C.Cl. 151, (1964) certiorari
denied by the U. S. Supreme Court,
377 U. S. 977. 11

Karlin v. Karlin,
(March 14, 1972), 24 Cal.App.3d 25 10

Phillipson v. Board of Administration,
3 Cal.3d 32, 40-41 10

Waite v. Waite,
(January 14, 1972), 6 Cal.3d 461 10

Williamson v. Williamson,
203 Cal.App.2d 8, 11 10

Wissner v. Wissner,
338 U.S. 655 (94 L.Ed. 424,
70 S.Ct. 398) 15

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TABLE OF AUTHORITIES CITED (Continued)

	Page
STATUTES	
10 U.S.C. 6321-6323.	3,4,5,12, 13,14
28 U.S.C. 1257 (3)	2
State of California, Civil Code Section 4800 (a)	6
CONSTITUTION	
United States Constitution, Article VI	3
MISCELLANEOUS	
30 Opinion, Attorney General 406	13

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

NO. _____

WILLIAM H. HOUSE,

Petitioner

vs.

BETTY LOU HOUSE

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT.

The petitioner, William H. House, prays that a Writ of Certiorari issue to review the opinion and judgment of the District Court of Appeal, State of California, Fourth Appellate District, rendered in these proceedings on June 13, 1972.

OPINIONS BELOW

From the District Court of Appeal, State of California, Fourth Appellate District:

1. Opinion entered on June 13, 1972, appearing at Appendix, infra, pp. 21.

JURISDICTION

The judgment of the District Court of Appeal, State of California, Fourth Appellate District was entered on June 13, 1972. A timely petition for rehearing was filed and thereafter denied on June 29, 1972. A timely petition for hearing was filed in the Supreme Court of the State of California and denied on August 9, 1972, and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3)

QUESTIONS PRESENTED

William H. House filed a petition to have his marriage to Betty Lou House dissolved under laws of the State of California. The questions thereby pre-

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sented are:

1. Is the pay received by a retired officer of the United States Navy under 10 U.S.C. 6321-6323 current income for continuing services rendered the United States of America or is it in the nature of a pension right such that, if vested, upon the dissolution of a marriage of which the officer is a party, it would be a property rights subject to division under the community property laws of the State of California?

2. When does a commissioned officer of the United States Navy obtain such an unconditional right to retirement compensation under 10 U.S.C. 6321-6323 that it may be deemed to be a vested property interest?

3. Do the community property laws of the State of California, as applied to the pay received by a retired commissioned officer of the United States Navy, conflict with Federal Statutes such that under the Supremacy Clause of the United States Constitution (Article VI) the Federal Statutes prevail and prevent the payment to other than the retired officer?

STATUTORY PROVISIONS INVOLVED

10 U.S.C. 6321 (a):

"(a) Each officer of the Regular Navy or the Regular Marine Corps holding a permanent appointment in the grade of warrant officer, W-1, or above who applies for retirement after completing 40 or more years of active service shall be retired by the Secretary of the Navy." (Emphasis ours.)

10 U.S.C. 6322 (a):

"(a) An officer of the Regular Navy or the Regular Marine Corps holding a permanent appointment in the grade of warrant officer, W-1, or above who applies for retirement after completing 30 or more years of active service may, in the discretion of the Secretary of the Navy, be retired." (Emphasis ours.)

10 U.S.C. 6322 (c):

"(c) Each officer who is retired under this

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section is entitled to retired pay at the rate of 75 percent of the highest basic pay of the grade in which retired." (Emphasis ours.)

10 U.S.C. 6323 (a):

"(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President." (Emphasis ours.)

10 U.S.C. 6323 (e):

"(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but

the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based." (Emphasis ours.)

Civil Code of the State of California, Section 4800 (a) provides:

"(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, the court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties, including any such property from which a homestead has been selected, equally."

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STATEMENT OF THE CASE

The Facts relevant to the questions presented by this petition may be introduced to the Court as follows:

William H. House, was the Petitioner in the original Petition for Dissolution of Marriage filed in the Superior Court of California, County of San Diego, on April 28, 1970. The Respondent was Betty Lou House.

Petitioner, William H. House, entered the United States military service in 1936 as a Midshipman at the United States Naval Academy. The Petitioner received his commission June 6, 1940, and advanced to the rank of Rear Admiral. The Petitioner was on active duty in the United States Navy, with over thirty (30) years service, at the time of the dissolution of the marriage. There was no request for retirement from the United States Navy pending at the time of the trial of the dissolution matter.

In the Superior Court of California, County of San Diego, the original trial Court, the nature and

status of compensation received by members of the United States Armed Forces, both prior and subsequent to retirement, was fully argued and briefs filed.

The Findings of Fact and Conclusions of Law dated April 13, 1971 in said Superior Court specifically covered said issue as follows:

> "2) That the petitioner, William H. House, is a Rear Admiral in the United States Navy, on active duty with over thirty years of military service; that he has a future contingent expectancy of Navy retirement compensation."

In the Interlocutory Judgment of Dissolution the trial Court found that the Petitioner had a future contingent expectancy of Navy retirement compensation and ordered as follows:

> "4) Petitioner's Naval retirement is not community property, and in fact is separate property, and that it is not subject to disposition by this Court and that petitioner shall be awarded, as his sole and separate property, said Naval retirement."

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The Final Judgment of Dissolution of said Superior Court, dated December 15, 1971, to be entered nunc pro tunc as of June 14, 1971, specifically reserved this issue by including the following order:

"...that all rights to appeal the property interest in Navy Retirement are reserved."

The Court of Appeal, Fourth Appellate District, Division One, State of California, reversed that part of the Interlocutory Judgment of Dissolution which had found that the Petitioner's Naval retirement pay to be his separate property, and said District Court of Appeal, State of California found that the Respondent had a community interest in the retirement pay.

A Petition for Rehearing in the Court of Appeal Fourth Appellate District, Division One, State of California was denied on June 29, 1972.

A Petition for Hearing in the Supreme Court of the State of California was denied on August 9, 1972.

REASONS FOR GRANTING WRIT

The California Court decisions relating to community property, for the last few years have come to the decision that vested retirement compensation (in general) is community property subject to division between the parties in a dissolution proceeding. Phillipson v. Board of Administration, 3 Cal.3d 32, 40-41; Waite v. Waite, (January 14, 1972), 6 Cal.3d 461; Williamson v. Williamson, 203 Cal.App.2d 8, 11.

More recent California Court decisions have extended this ruling to include the pay received by a retired officer of the United States Armed Forces, or an officer who is still on active duty and has completed at least twenty (20) years military service. French v. French, 17 Cal.2d 775, 778; Bensing v. Bensing, (May 23, 1972, 1 Civil No. 28959); Karlin v. Karlin, (March 14, 1972), 24 Cal.App.3d 25.

The Petitioner contends that the decisions of the California Courts including compensation of retired commissioned officers of the United States Armed Services in the same category as "vested" retirement compensation (in general) are erroneous on the following basis:

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1) The pay received by a retired officer of a regular component of the Armed Forces of the United States is a present salary received for fulfilling a public office and is not a pension for past services rendered.

In interpreting the nature of compensation received by a military officer, the construction given by Federal Courts should be binding upon the States.

In Hooper v. United States, 164 C.Cl 151, (1964) certiorari denied by the U. S. Supreme Court, 377 U.S. 977, the Court of Claims, in a suit by a retired Naval officer for recovery of retired pay forfeited when he was dismissed from the service by sentence of Court-Martial for violation of the Uniform Code of Military Justice committed after being placed on the retired list, held that the plaintiff's status as a member of the Armed forces was not terminated with his retirement and therefore Congress had the power to provide for his trial by Court-Martial.

The Court states: "Consequently, we hold that the exercise of jurisdiction by the Military Tribunal over this plaintiff was constitutionally valid, since we believe that this plaintiff was part of this 'Land and Naval Forces.' We say this because the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies. He had a direct connection with the operation of the 'Land and Naval Forces.'" (Emphasis ours.)

2) There is no vested right for a military officer, on active duty, to retire until the completion of forty (40) or more years active service.

10 U.S.C. 6323 (a). "An officer of the Navy... who applies for retirement after the completion of more than twenty years of active service..., may, in the discretion of the President, be retired...."

10 U.S.C. 6322 (a). "An officer of the regular Navy...who applies for retirement

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> after completing thirty or more years of active service, may, in the discretion of the Secretary of the Navy, be retired."

10 U.S.C. 6321 (a). "Each officer of the regular Navy...who applies for retirement after completion of forty or more years of active service, shall be retired by the Secretary of the Navy."

Historical and Revision Notes on the construction of 10 U.S.C. 6321, which refers to the word "shall" after forty (40) years of active military service is covered in (30 Op.Atty.Gen. 406) which states as follows:

> "The word 'shall' is substituted for the word 'may' because the Attorney General has construed R. S. 1443 as conferring a right to retirement upon officers who apply for it after forty years of service."

It will be noted by the above citations that a Navy officer does not have a right to retirement until after completing forty (40) years of active service. Earlier retirements are at the dis-

cretion of the President or the Secretary of the Navy and, therefore, are not an absolute right.

3) The Supremacy Clause of the United States Constitution (Article VI) prevents the payment of retirement compensation to other than the retired officer.

10 U.S.C. 6322 (c), states as follows:

> "Each officer who is retired under this section is entitled to retired pay at the rate of 75 percent of the highest basic pay of the grade in which retired."

10 U.S.C. 6323 (e), states as follows:

> "Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay to which he would be entitled if serving on active duty in the grade in which retire multiplied by the number of years of service that may be credited to him under section

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1405 of this title, but the retired pay may not be more than 75 percent of the basic pay upon which the computation of retired pay is based."

The above quoted statutes are Federal Statutes and clearly state that it is the retired officer who is entitled to pay, not spouses or any other factor which a State Court would order.

"In the case of Wissner v. Wissner, 338 U.S. 655 (94 L.Ed. 424, 70 S.Ct. 398) when an insured named a person other than his wife under a National Service Life Insurance Policy, the named beneficiary prevailed contrary to the interest of the wife under the California community property law."

"In the Free v. Bland case, 369 U. S. 633 (8 L.Ed.2d 180, 82 S.Ct. 398) the co-owner of U. S. Savings Bonds went to the surviving owner as opposed to the Texas community property law."

4) A reason for distinquishing the pay received by retired officers of the United States Armed Forces from retirement compensation (in gen-

eral) is due to the transitory nature of the members of the Armed Forces, and the necessity for the uniform administration of retirement compensation for officers of the United States Armed Forces.

(a) A person who voluntarily selects employment in one State and continues the employment in said State until retirement voluntarily accepts the laws of that State.

(b) A member of the Armed Forces is transferred at the will of the United States Government, and such transfer is not voluntary in nature.

(c) The present decision of the Court of Appeal, State of California, Fourth Appellate District, if allowed to stand, would interfere with the Congressional intent to provide for uniform compensation of retired military officers.

(d) If a military officer served eighteen (18) years duty in the military services in non-community states and was then ordered

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to serve in a community property state, he might be reluctant to comply with the orders due to the fact that within two (2) years his spouse would have a vested interest in his military retirement compensation.

(e) If a military officer was having marital problems with his spouse and had been in the service for eighteen (18) years, he would be encouraged to dissolve the marriage immediately, rather than spend the next two (2) years attempting to resolve the marital difficulties, at which time the spouse would have a vested interest in the military retirement pay.

(f) If a military officer served eighteen (18) years in Government service and then divorced, his spouse would have no interest in military retirement pay since the retirement compensation had not vested. If said military officer remarried between his eighteenth and twentieth year of military service, the second wife would have a "vested interest" in a proportionate share of the retirement pay.

(g) Consider the inequality under the following hypothetical set of facts:

> Two military officers complete their service until retirement, one in a community property state, and the other in a separate property state.
>
> Both officers obtain a divorce.
>
> Each spouse of the retired officers remarries in one year.
>
> The divorced spouse from the community property state would have a one-half interest in the military retirement compensation for the rest of the lives of the parties even after her remarriage. The divorced spouse of the military officer in a separate property state would receive alimony which terminated on her remarriage and the entire military retirement compensation would belong to the military officer.

(h) The decision, if allowed to stand, voids the recruiting promises made by the Federal Government to entice men to become career military officers.

(i) The decision, if allowed to stand, will strip career military officers of a Federal benefit and award this Federal benefit to a third party.

(j) The decision, if allowed to stand, will have a demoralizing effect upon the Armed Forces of the United States, especially this vital segment of experienced career officers.

(k) The decision, if allowed to stand, will invite further litigation regarding fringe benefits provided to career military officers, active and retired, such as medical care, Commissary and Exchange privileges.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeal in the instant case raises questions of general importance relating to the uniform administration of retirement compensation for commissioned officers of the Armed Forces of the United States of America which should be reviewed by this Court. Accordingly, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES ELLIOT BUNKER

THOMPSON, BUNKER, SULLIVAN & McGRATH

Counsel for Petitioner

APPENDIX

(Following is set forth the opinion of the District Court of Appeal, State of California, Fourth Appellate District in the matter of 4 Civ. No. 11106, In re Marriage of Betty Lou House and William H. House, Judgment entered June 13, 1972.)

The above House opinion incorporated in full, the opinion of N. Elaine Bensing v. Robert G. Bensing, Court of Appeal of the State of California, First Appellate District, Division Three, 1 Civil 28959, and attached a copy of the Bensing opinion as Exhibit "A" to the House opinion.

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IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal-Fourth Dist.
FILED
JUN 13 1972
JOHN R. McDOWELL; Clerk
/s/ E. Peterson

In re Marriage of

BETTY LOU and WILLIAM H. HOUSE.

WILLIAM H. HOUSE,

Respondent,

vs.

BETTY LOU HOUSE,

Appellant.

4 Civ. No. 11106

(Sup. Ct. No. D-43798)

OPINION

APPEAL from a judgment of the Superior Court of San Diego County. Roscoe S. Wilkey, Judge. Reversed in part with directions.

Turney & Turney, and Margaret V. Turney, for Appellant.

Thompson, Bunker & Sullivan and James E. Bunker, for Respondent.

Betty Lou House appeals from an interlocutory judgment decreeing the dissolution of her marriage to William H. House and adjudicating their property rights. She raises a single issue on appeal, contending the court erred in concluding her husband's naval retirement pay was not community property and not subject to court disposition in the dissolution proceedings. We have concluded the holding was erroneous and that a substantial portion of the retirement pay is community property.

Betty Lou and William were married in 1942. In April 1970, William, who was then a Rear Admiral in the United States Navy, filed a petition for dissolution of the marriage in the San Diego County Superior Court. When the case came to trial in January 1971, the parties had been married over 28 years; and William, although still on active duty with the navy, had completed more than 30 years of service, which entitled him to retirement pay benefits equal to 75% of his base pay

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upon retirement.[1]

The nature of William's retirement pay was a major issue at the trial. In its Finding of Fact No. 16, the court stated:

> "In the awarding of spousal support to respondent, this Court took into account its conclusion that petitioner's Navy retirement compensation was not subject to disposition by this Court in this proceeding."

In its Conclusion of Law No. 3, the court stated:

> "That the petitioner's future expectancy of Navy retirement compensation is not community property subject to division between the parties."

The interlocutory judgment itself contained the following:

> "Petitioner's Naval retirement is not community property, and in fact is separate property, and that it is not subject

---

FOOTNOTE 1: William's status with the navy was not made entirely clear at the trial, where his testimony implied he would serve several additional years on active duty. At the motion for new trial on May 27, 1971, it was established he had then received orders making his retirement effective July 1, 1971. His brief on appeal, filed November 24, 1971, contains this statement: "Since the completion of trial it has been learned Admiral House requested retirement on December 31, 1970. The request was returned to him asking that he reconsider. At the time of trial January, 1971, the request had been returned and was ineffective. After the completion of trial, Admiral House, on Feb. 3, 1971, resubmitted the request. It was accepted and became effective July 1, 1971."

> to disposition by this Court and that petitioner shall be awarded, as his sole and separate property, said Naval retirement."

The trial court came to the above conclusions at a time when the applicable California law was unsettled and before the decision of the Supreme Court in Waite v. Waite (Jan. 14, 1972), 6 Cal.3d 461, and the even more recent decisions of the Court of Appeal in In Re Marriage of Karlin (March 14, 1972), 24 Cal.App.3d 25, and Bensing v. Bensing (May 23, 1972, 1 Civ. No. 28959). While Waite and Karlin appear in slightly different factual contexts from this case, we believe the decisions dictate the conclusion a substantial portion of William's naval retirement pay was community property, subject to disposition by the court in the marriage dissolution proceedings. If any doubt existed as to the validity of this conclusion, it was resolved by Bensing, which involved a divorce action between a Major in the United States Air Force and his wife.

While the opinion in Bensing has been certified for publication, it has not yet appeared in the advance sheets. Because we agree with its reasoning and conclusions, and because it resolves the issue raised here, we incorporate the Bensing opinion in full and attach a

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copy of it as Exhibit "A" to this opinion.

From the evidence before it, the trial court should have found the naval retirement benefit was community property to the extent it resulted from William's service during the years of the marriage and should have computed the amount or percentage Betty Lou was entitled to receive from the monthly retirement pay. (Since the retirement has now occurred (July 1, 1971), the computation can be made with precision.)

To the extent the court awarded alimony payable beyond William's retirement date, the award was influenced by the determination Betty Lou had no community interest in the retirement pay. So the trial court may fairly consider the matter in its entirety and give credit for alimony paid against her claim on the retirement payments William has already received, we also reverse that part of the interlcoutory judgment awarding alimony beyond July 1, 1971.

That part of the interlocutory judgment decreeing William's naval retirement pay to be his separate property is reversed. The trial court is directed to compute Betty Lou's community interest in the retirement pay in accordance with the views expressed in this opinion and to order William to pay her that amount or per-

centage as he receives it on a monthly basis, effective July 1, 1971, the payments to terminate upon the death of either party. That portion of the interlocutory judgment awarding Betty Lou alimony beyond July 1, 1971, is also reversed. In all other respects the interlocutory judgment is affirmed.

/s/ Ault
J.

WE CONCUR:

/s/ Brown
P.J.

/s/ Whelan
J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division Three

F I L E D

MAY 23, 1972

Court of Appeal-First App.Dis
CLIFFORD C. PORTER, Clerk
By _____ Deputy

N. Elaine Bensing,

Plaintiff and Respondent,

vs.

Robert G. Bensing,

Defendant and Appellant.

No. 28959

BY THE COURT:

The written opinion filed May 23, 1972 is ordered amended by adding at line 18, page 10, the following:

"Each party is to bear his own costs on appeal."

DATED: May 25, 1972

/s/ Murray Draper, P. J.
P.J.

Exhibit "A"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

F I L E D

MAY 23, 1972
Court of Appeal-First App.Dist.
CLIFFORD C. PORTER, Clerk
By _____ Deputy

M. ELAINE BENSING,

Plaintiff and Respondent,

vs.

ROBERT G. BENSING,

Defendant and Appellant.

1 Civil 28959

(Sup. Ct. No. 46086)

This is an appeal in a divorce action in which the appellant husband claims the court erred in declaring his pension benefits to be community property and subject to division even though he had not retired. Appellant also claims that the court failed to consider the wife's retirement benefits in its award and, further, that the evaluation of items of person property was not based on substantial evidence.

The evidence disclosed that appellant was a major in the Air Force. During the 23 years of the marriage and for five years prior to the marriage, appellant was in military service. He was eligible for retirement

but at the time of the divorce was still in the Air Force. He testified that his retirement income would be approximately $700 a month. The court found that the retirement benefits were community property to the extent that they resulted from service during the years of marriage. Based upon the percentage earned during marriage, the life expectancy of the appellant and the estimate of $700 per month benefits, the court calculated the community property portion of the retirement benefits to have an actuarial value of $91,149.50. The court also found that other community assets totaled $27,683.61. Of this property he awarded items totaling $16,470.00 to respondent and items totaling $11,913.61 to the appellant. In order to equalize the award of the community property, the court divided the retirement benefit in the sums of $43,296.76 to respondent and $47,853.15 to appellant. Appellant was ordered to pay respondent her share of the retirement benefits at the rate of $271.72 per month starting on April 1, 1970.

Appellant first contends that military retirement benefits are contingent upon both retirement and survival and do not vest until retirement. Therefore, appellant argues, as he had not retired but was merely

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eligible for retirement, the pension benefits should be considered a mere expectancy not subject to division as community property.

We do not agree with this contention. Pension benefits are a part of the consideration earned by the employee. They are not gratuities of the employer but, as a part of the salary earned by such employee, they are community property. "Both employee and non-employee (spouse) own community property rights in the pension fund that are of equal stature; such rights are equally subject to the power of the divorce court." (Phillipson v. Board of Administration, 3 Cal.3d 32, 50.) This applies not only to the accumulated contributions the employee has made to a pension plan but also to the entire matured pension rights payable as a benefit of employment. (Waite v. Waite, 6 Cal.3d 461, 469-470). "(P)ensions become community property, subject to division in a divorce, when and to the extent that the party is certain to receive some payment or recovery of funds." (Williamson v. Williamson, 203 Cal.App.2d 8, 11) Application of this latter principle in Williamson resulted in a determination that a policeman's wife was not entitled to a division of pension rights. The provisions

of the pension fund were such that the employee was not entitled to any portion of the fund until he had served 20 years. At the time of the divorce, the husband in Williamson was not eligible to retire.

Likewise, in French v. French, 17 Cal.2d 775, the court recognized that retirement pay of appellant, who was in the U. S. Navy, was community property but held in that case that retirement pay was a mere expectancy because the appellant had not completed the number of years of normal service in the fleet reserve to become eligible for the pension. (p. 778.)

Here the appellant had completed the required number of years of service and was eligible for a pension. He does not dispute the contention that he only needed to apply for the pension benefits to receive them. Thus, the only condition to the payment of pension benefits is a condition entirely within Major Bensing's control and this is not the type of uncertainty which precludes division upon divorce. This was brought out in Waite v. Waite, supra, 6 Cal.3d 461, 472, where the court held that the pension benefits of a retired California judge were community property and divisible upon divorce. The husband argued that retired judges do not enjoy an

unconditional and vested right to pension payments because the acceptance by a retired judge of a temporary judicial assignment reduces his pension to the extent of the salary he receives. In rejecting this argument, the court stated: "Yet the choice of whether or not the judge accepts future judicial assignments, if any are offered by the Chairman of the Judicial Council, lies with the judge; the exercise of any right accorded by the Judges' Retirement Law is completely within his control; hence this option does not reduce the pension to a 'conditional' one. Defendant's rights under the Judges' Retirement Law, coupled with his power to refuse further judicial assignment, render his pension fully as secured, as 'vested,' as that of any other public employee." (p. 472; emphasis added.)

Here, to accept appellant's argument would mean that a spouse could be deprived of any share of matured pension rights by the decision of the employee to delay retirement until after the divorce proceedings were concluded. This would deprive respondent of her share of the community's most substantial asset. Thus the trial court was correct in determining the benefits to be a divisible asset.

The judgment awards to the wife "the sum of $43,296.76 as her share of defendant's retirement benefit which is in the amount of $91,149.90, payable at the rate of $271.72 per month until her entire share of the retirement benefits has been paid" and, in the following paragraph, directs that he "shall pay to the plaintiff wife the sum of $271.72 per month from his monthly retirement pay until the full amount of $43,296.76 has been paid." Thus, the judgment provides that payments shall continue until the full $43,296.76 has been paid, but also provides that the payments are to be made "from his monthly retirement pay." These directions might appear to be inconsistent because, while the wife is entitled to a proportionate share of the pension, the pension payments may never reach the actuarial value set by the court. The pension here terminates upon husband's death. Also, if the wife dies before the monthly payments to her amount to the actuarial "present value" of the pension, the payments to her cease and her share is payable to the husband. Her devisees and heirs are not entitled to the share of the pension she would have received if she lived. (Waite v. Waite, supra, 6 Cal.3d 473.)

The seeming inconsistency in the wording of the award may be reconciled, however, by accepting the obvious intention of the trial court. The parties are entitled to an equal share of the community property but neither has the right to demand a precise division of each asset which is rarely possible when those assets consist of tangible and intangible assets. (Waite v. Waite, supra, p. 473.) In fact, in Phillipson v. Board of Administration, supra, 3 Cal.3d 32, 46, the court said "that if the community musters sufficient assets to do so, the preferable mode of division would be to award the pension rights to the employee and property of equal value to the spouse." This reasoning was reiterated in dictum in Waite v. Waite, supra, 474. Here it was clearly not feasible for the court to award the pension to one spouse and the tangible assets to the other as the tangible assets of the community did not have a value equivalent to the value of the pension.

It seems reasonable to believe that the court did not intend to award the wife a fixed total sum. The pension terminates with the death of the husband, and wife's share also terminates if she predeceases the husband. Thus, the actuarial value of the pension may

never be reached. The more apparent reason for placing an actuarial value on the pension of $91,149.90 and awarding $43,296.76 to the wife and $ 47,853.15 to the husband was to compensate husband for the allowance to wife of tangible assets which had $4,556.39 greater value than those tangibles awarded husband.

It is conceivable that husband may not live his actuarial life expectancy and thus may not receive sufficient installments to equalize the larger amount of tangible assets awarded wife. The court here, however, accomplished substantial justice within the limits of practicality presented by the facts by awarding the wife a monthly payment reduced by an amount which, on the law of averages, will be sufficient to compensate husband for the slight deficiency he suffers in the division of the small amount of tangible community property which has a presently determinable market value.

Since the trial court's manner of division of the community assets is subject to reasonable interpretation, we construe the judgment as awarding to the wife as her share of the pension benefits the sum of $271.72 per month, starting April 1, 1970, continuing so long as both husband and wife live, and terminating

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upon the death of either. Those portions of the findings, conclusions and judgment which purport to fix a value of $43,296.76 upon the interest of wife, and to award her that lump sum, are stricken.

Appellant next contends that the court erred in failing to consider respondent's retirement benefits from her civil service employment in evaluating and dividing the community property.

Respondent testified that she was employed at Travis Air Force Base under civil service. There was no testimony that she had any matured pension rights whatsoever or had made any contributions to a pension plan. The appellant did not ask the court to consider any pension rights of respondent as community property either at the hearing or in the letter he submitted proposing a division of community property. Appellant may not now seek a retrial of this issue on which he presented no evidence below nor complain that the trial court failed to consider it. (Thompson v. Thompson, 136 Cal.App.2d 539, 542; Dunn v. Dunn, 180 Cal.App.2d 839, 842.)

Appellant also contends that there was no substantial evidence supporting the court's evaluation of other items of community property.

Valuation is a question of fact for the trial court. This court is governed by the rule that when a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court is limited to the determination of whether there is any substantial evidence, contradicted or uncontradicted, which supports the finding of fact. (Gonzales v. Gonzales, 267 Cal.App.2d 428, 436; Primm v. Primm, 46 Cal.2d 690, 693; Tinney v. Tinney, 211 Cal. App.2d 548, 553.) While there was conflicting evidence as to the value of some of the couple's household and collector's items, the trial court resolved the conflicts on substantial evidence and its decision as to those items will not be disturbed on appeal.

The judgment is ordered modified by striking therefrom paragraphs 7 and 8, and substituting therefor the following: "7. That defendant shall pay to plaintiff, as a further division of community property, the sum of $271.72 per month, starting April 1, 1970, and continuing so long as both plaintiff and defendant live,

....

.....

but to terminate upon the death of either." As so modified, the judgment is affirmed.

CERTIFIED FOR PUBLICATION

Brown (H. C.), J.

We concur:

Draper, P. J.

Caldecott, J.

STATE OF CALIFORNIA
COURT OF APPEAL
FOURTH APPELLATE DISTRICT

DIVISION ONE

SAN DIEGO, CAL. June 29, 1972

No. 4 Civil 11106

In Re: Marriage of Betty Lou and William H. House

By the Court: The Petition for Rehearing is denied.

Brown, P. J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Order Due
August 11, 1972

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, Civil No. 11106

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF HOUSE

F I L E D
AUG 9 1972
G.E.BISHEL, Clerk
S.F. Deputy

Respondent's petition for hearing DENIED.

BURKE, J.
Acting Chief Justice